

SERVICE DATE – LATE RELEASE MAY 8, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.

v.

MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

MOTION FOR PROTECTIVE ORDER

Decided: May 7, 2002

DHX, Inc. (DHX), a freight forwarder, has filed a complaint challenging the reasonableness of certain rates and practices of two water carriers in the noncontiguous domestic trade, Matson Navigation Company and Sea-Land Service, Inc., now SL Service, Inc. (defendants). On December 21, 2001, the Board served a decision in this proceeding denying motions to dismiss the complaint and directing the parties to consult with each other and jointly recommend a procedural schedule. In a decision served on March 28, 2002, a procedural schedule was adopted. Under the schedule, DHX's amended complaint was due on April 29, 2002, answers to the amended complaint are due on May 20, 2002; the discovery period ends on June 19, 2002, the opening statement is due on July 19, 2002, reply statements are due on August 19, 2002, and the rebuttal statement is due on September 9, 2002.

By joint motion filed on April 9, 2002, the parties seek a protective order with respect to evidentiary submissions and discovery. The proposed order, as set out in the appendix, is consistent with the protective orders entered by the Board in similar proceedings.¹ It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury.

¹ See Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104 (STB served May 10, 2000).

Issuance of the requested protective order will ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

It is ordered:

1. The joint motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. This Order shall apply to all documents, information and other products of discovery (including testimony and transcripts of testimony taken at deposition) obtained by any party to this proceeding pursuant to discovery requests (including workpaper requests), whether directed to another party or to a person not a party to this proceeding, or submitted through evidentiary filings in this proceeding.

2. Any party or person responding to a discovery request (including a workpaper request) may designate as “CONFIDENTIAL” any response (including production of documents) or portion thereof that it in good faith contends contains confidential, proprietary or commercially sensitive information. Any party or person responding to such a request may also designate as “HIGHLY CONFIDENTIAL” any Confidential information that it in good faith contends contains such highly sensitive information (e.g., the non-public terms of transportation agreements involving any of the parties, customer-specific traffic, revenue, price or cost information, or traffic and revenue projections) that disclosure to employees or agents of another party, even subject to the restrictions of this Order governing the use and dissemination of Confidential information, could reasonably threaten significant economic or competitive harm to the producing party or person. Except as provided by Paragraph 5, “Confidential” and “Highly Confidential” as used herein include all such designated responses, any copies, extracts, abstracts or summaries or all or part of such responses, and all or any portion of information contained in such responses.

3. Responses to discovery requests (including workpaper requests) may be designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” as follows:

(a) Responses or portions of responses to interrogatories, written deposition interrogatories, requests for admission or workpaper requests may be designated by stamping or printing “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in the front thereof and, if only portions of the response are to be so designated, clearly marking the Confidential or Highly Confidential portions.

(b) Prior to the production of documents to the requesting party, documents may be designated by separating them from other documents and informing the requesting party that they contain “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” information. Copies of documents or portions of documents produced to the parties may be designated by producing such documents in separate containers clearly marked as containing “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” information or stamping “CONFIDENTIAL” on each page

containing Confidential information, or stamping “HIGHLY CONFIDENTIAL” on each page containing Highly Confidential information, and, if only portions of a document page are to be so designated, clearly marking the Confidential portions.

(c) A deponent or the attorney for a deponent may designate the deponent’s entire testimony and the transcript thereof to be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” by so requesting on the record prior to the conclusion of the deposition. Such designation shall be effective only until 15 days after the availability of the transcript of the deposition, after which portions of the deposition testimony may be designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” only by informing each party in writing of the pages, and the portions thereof, that contain Confidential or Highly Confidential information.

4. If a party or person inadvertently fails to designate discovery or other material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in a timely fashion as provided herein, it may make such a designation subsequently by notifying the parties in writing. After receipt of such information, such materials and information shall be treated as if they had been designated in a timely fashion.

5. Any party at any time may by written notice request that the producing party or person cancel the “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation of any transcript, document or discovery response or portion thereof. Such request should identify particularly the designated responses it contends should not be treated as Confidential or Highly Confidential, provide the reasons therefor, and explicitly state that the request is made pursuant to this paragraph. Such request shall be deemed granted 10 days after receipt of the request, unless the producing party or person, prior to the end of the 10-day period, sends the requesting party a written denial of the request by telecopier or hand delivery. If such request is denied in whole or in part, the requesting party may file a motion with the Board to have the “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation removed as to the discovery responses listed in the request. The burden of establishing that the responses should not be afforded the protections of this Order shall be on the moving party.

6. Other than as provided in Paragraph 7 below, Confidential and Highly Confidential information may only be disclosed to “Authorized Persons.” An “Authorized Person” is a person who, prior to the receipt of any Confidential or Highly Confidential information, has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and who, in the case of Confidential information, is:

(a) an attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(b) a person who is an employee or agent of a party and is actively involved in this proceeding;

(c) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(d) a reporter employed to record depositions;

or who, in the case of Highly Confidential information, is:

(x) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;

(y) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or

(z) a reporter employed to record depositions.

Each such undertaking by an "Authorized Person" shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such "Authorized Person" is affiliated or associated, and a copy of each such undertaking shall be served upon counsel of record for each party no later than 10 days after such undertaking is executed.

7. Confidential and Highly Confidential information may also be disclosed to:

(a) an employee of the producing party during a deposition of such employee;

(b) a deponent employed by an organization that also employs the person who produced the Confidential or Highly Confidential information to be disclosed to the deponent;
or

(c) any person so authorized either (i) in writing by the party or person that produced the Confidential or Highly Confidential information to be disclosed to such person, or (ii) by the Board upon motion by any party for good cause.

8. Storage, transmission or communication of Confidential and Highly Confidential information must be such as to reasonably ensure that the Confidential and Highly Confidential information will not be disclosed, accidentally or otherwise, to non-authorized persons.

9. No person may be present at a deposition during the discussion of Confidential or Highly Confidential information who has not been authorized by this Order to review the Confidential or Highly Confidential information to be discussed. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review that material under this Protective Order.

10. Confidential and Highly Confidential information may be used by the receiving party, and by any "Authorized Person," solely for purposes of this proceeding and any directly related proceedings involving judicial review of any Board decision or order in this proceeding, and not for any other purpose whatsoever (including any business or commercial purpose). Confidential and Highly Confidential information may not be used in any other litigation unless obtained in that litigation.

11. All Confidential and Highly Confidential information filed with the Board, and any pleading, motion, or other paper filed with the Board that contains or discloses Confidential or Highly Confidential information shall be filed under seal and kept under seal until further order of the Board. If any party intends to use Confidential and/or Highly Confidential material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to the Administrative Law Judge, the Board or the Court to: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with this Protective Order.

12. All documents containing Confidential or Highly Confidential information shall, at the option of the producing party/person, be destroyed or returned to the producing party/person at the termination of this proceeding, including all appeals; provided, however, that outside counsel may retain file copies of any unredacted pleadings and materials filed with the Board or a court.

13. The provisions of this Order that restrict the handling, communication and use of Confidential and Highly Confidential information shall continue to be binding after the termination of this proceeding, including any related court litigation or judicial appeals, unless the Board or the producing party/person authorizes in writing alternative handling, communication or use of the information.

14. This Order shall not bar or otherwise restrict:

(a) a party or producing person from opposing production of any information under the Board's Rules of Practice;

(b) an "Authorized Person" from making copies, abstracts, digests and analyses of Confidential and Highly Confidential information for use in connection with this proceeding subject to the requirement that all such copies, abstracts, digests and analyses be treated as Confidential or Highly Confidential, as the case may be, and clearly marked as such;

(c) an "Authorized Person" from rendering advice or opinions with respect to this proceeding to his or her client or employer based upon his or her examination of Confidential or Highly Confidential information as long as such person does not disclose the Confidential or Highly Confidential information itself to a person not authorized by this Order to have access to the Confidential or Highly Confidential information, as the case may be;

(d) a party from using any Confidential or Highly Confidential information during hearings in this proceeding, subject to any further order of the Board;

(e) a party or producing person from using its own Confidential or Highly Confidential information in any manner it sees fit, or from revealing such Confidential or Highly Confidential information to whomever it chooses, without the prior consent of any other party or of the Board; and

(f) a party or producing person from applying to the Board at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires.

15. If Confidential or Highly Confidential information in the possession of any party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed will not produce such information without first giving written notice (including the delivery of a copy thereof) to the producing party/person or the attorneys for the producing party/person, within 24 hours after receipt of the subpoena. If a subpoena purports to require production of such Confidential or Highly Confidential

information on less than 4 business days' notice, the party to whom the subpoena is directed shall also give immediate notice by telephone of the receipt of such subpoena.

16. Information that is obtained outside of this proceeding shall not be subject to this Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

17. To the extent that Confidential or Highly Confidential information is produced by a party or other person in this proceeding and held and used by the receiving party in compliance with the terms of this Order, such production, disclosure and use of such Confidential or Highly Confidential information are deemed essential for the disposition of this proceeding and shall not be deemed a violation of 49 U.S.C. 11904.

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____)	
DHX, Inc.)	
)	
Complainant,)	
)	
v.)	STB Docket No. WCC-105
)	
Matson Navigation Company and)	
Sea-Land Service, Inc.,)	
)	
Defendants.)	
_____)	

CONFIDENTIALITY UNDERTAKING

I, [Name], am [Position or Job Title], of [Company, Firm or Employer], [Address of Company, Firm or Employer]. I am:

- () an outside attorney actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;
- () an attorney who is a regular employee of a party and is actively involved in this proceeding;
- () a person who is an employee or agent of a party and is actively involved in this proceeding;
- () a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision;
- () a court reporter employed to record depositions in the captioned proceeding,

and affirm that I have read and understand the Protective Order served on May 8, 2002, in STB Docket No. WCC-105, and that I agree to abide by the terms of such Protective Order.

Dated:_____